20346 SERVICE DATE - MARCH 25, 1997
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41282

KRAFT GENERAL FOODS, INC. AND KRAFT FOOD INGREDIENTS CORP.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF JONES TRUCK LINES, INC.

Decided: March 13, 1996

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Illinois, Eastern Division, in Jones Truck Lines, Inc. v. Kraft General Foods, Inc. and Kraft Food Ingredients Corp., No. 93 C 3719.

The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Kraft General Foods, Inc. and Kraft Food Ingredients Corp. (Kraft or petitioner). Jones seeks undercharges of $17,999.62 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 92 less-than-truckload (LTL) shipments of food products and related commodities between July 18, 1988, and July 7, 1989.[2] The shipments were transported principally to or from petitioner's facilities located in Memphis, TN (78 shipments). The remaining claims involve movements to or from petitioner's facilities in Decatur, GA, Springfield, MO, Denver, CO (2 shipments), Pearl, MS (9 Shipments), and Tupelo, MS. By order dated May 3, 1994, the court dismissed the proceeding without

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] In the court action, Jones claimed undercharges of $18,010.73 based on 93 balance due freight bills. A re-audit of the freight bills has resulted in the cancellation of one freight bill and a reduction in the amount of claimed undercharges to $17,999.62.

prejudice and directed petitioner to submit issues of contract carriage, tariff applicability, unreasonable practice, and rate reasonableness to the ICC for resolution.

Pursuant to the court order, on June 23, 1994, Kraft filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served July 1, 1994, and corrected July 15, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on November 21, 1994. Respondent has not submitted a reply statement and, indeed, has failed to make an appearance or otherwise participate in any aspect of this proceeding.[3]

Kraft asserts that the majority of the shipments at issue were transported in accordance with tariffs lawfully filed by Jones and that some were transported by Jones under its contract carrier authority pursuant to transportation agreements. Petitioner further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Petitioner supports its contentions with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by Kraft. Mr. Bange's affidavit includes among its attachments the "corrected" balance due freight bills issued by respondent that reflect the computer version of the originally billed charges and the claimed balance due amounts (Exhibits A, E, F, G-1, H-1, and I-1), as well as copies of tariffs ICC JTLS 221-A Item 41500, effective June 4, 1987 (Exhibits C and D), and ICC JTLS 605-D effective February 8, 1985 (Exhibits G, H, and I). Item 41500 of Tariff JTLS 221-A provides for the application of distance commodity rates for the account of Kraft Foods for movements between Memphis, Denver, Decatur, and Springfield, and points served directly by Jones. Tariff JTLS 605-D provides for a 45% discount off class rates for Kraft Foods, Inc. outbound movements from Memphis, subject to a minimum charge of $34.00 (Item 290-5179); a 30% discount off class rates for inbound movements to Memphis (Item 290-4525); and a 30% discount off class rates for inbound movements to Springfield (Item 640-5100). Also included with Mr. Bange's affidavit are two documents bearing the title "Transportation Agreement" dated May 9, 1988, and May 23, 1988, signed by representatives of Kraft and Jones. These documents provide for the application of a 30% discount off class rates on outbound movements from petitioner's Pearl facility and a 40% discount for inbound shipments to the Pearl facility, subject to a minimum charge of $34.00.

Mr. Bange states that his review of respondent's balance due bills indicates that, with minor variations, the distance commodity rates set forth in tariff JTLS 221-A Item 41500, the various percentage discounts called for in tariff JTLS 605-D, and the rates and charges set forth in the transportation agreements are identical to or in conformity with the freight charges originally assessed by Jones.

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[3] Kraft's counsel has certified that petitioner's opening statement of argument and affidavit testimony has been served on Jones' counsel.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[4]

It is undisputed that respondent is no longer an operating carrier. Accordingly, we may proceed to determine whether Jones' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains copies of published tariff provisions containing distance commodity rates and various percentage discounts that conform to the rates applied to all but 9 of the shipments that are the subject of this proceeding. With respect to the remaining 9 shipments, the record contains two 1988 transportation agreements signed by the parties confirming the existence of negotiated discount rates for movements from and to Pearl. In addition, petitioner has submitted balance due bills indicating that the original freight bills issued by respondent consistently applied rates that reflected the distance commodity rates, stated discounts, and minimum charges called for in the tariff provisions and transportation agreements. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994).

In this case, even if, for some reason, the tariff rates applied to the majority of the shipments were not applicable, the evidence is substantial that the rates originally billed by the carrier and paid by the shipper were rates agreed to in negotiations between the parties. The original freight bills

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[4] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

issued by the carrier confirm the rates set forth in the tariff provisions and the 1988 transportation agreements and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance on the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence supports the conclusion that negotiated rates were offered to Kraft by Jones; that Kraft tendered freight in reasonable reliance on the agreed-to rates; that the negotiated rates were billed and collected by Jones; and that Jones now seeks additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Kraft for the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on March 25, 1997.

3. A copy of this decision will be mailed to:

The Honorable William T. Hart
United States District Court for the
Northern District of Illinois Eastern Division
U.S. Courthouse
219 South Dearborn Street
Chicago, IL 60604

Re: No. 93 C 3719

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary